In the High Court of Judicature at Madras

Dated: 29/09/2003

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The Honourable Mr.Justice A.K.RAJAN

Writ Petition No.3369 of 2002

S.Arul Lingam ..... Petitioner

-Vs-

1. The Joint Registrar of
Co.operative Socities
Kanyakumari District.
2. The Deputy Registrar of
Co-operative Societies
Kanyakumari Dsitrict
3. Kalkulam Vilavancode Taluk
Co-operative Marketting
Society rep. by its
Special Officer
Marthandam
Kanyakumari District. ..... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India for the issue of a writ of Certiorarified Mandamus as stated therein.

For petitioner : Mr.K.Chandru,Senior Counsel
for Mr.S.Arunachalam

For respondents : Mr.R.Vijayakumar
GA for R1 & R2
Mr.T.Ravindran,
for Mr.T.S.Gopalan, for R3

:O R D E R
The petitioner filed the above writ petition praying to issue a writ of Certiorarified Mandamus to call for the records connected with the termination order passed by the third respondent in RC No12/2001 dated 27.11.2001 and quash the same and further direct the respondents to reinstate the petitioner with back wages and continuity of services as per the Award dated 27.04.2001.
2. The facts that are necessary for the purpose of disposal of the writ petition is that the petitioner worked in the IMFL shop run by the second respondent society; he was appointed on daily wages; the petitioner has

completed more than 240 days' of service; while so, all of a sudden, the second respondent denied employment to the petitioner from 31.05.1998 without any previous notice or intimation; that the petitioner demanded continuous employment but the second respondent did not engage him further. Hence, industrial dispute was raised before the Assistant Commissioner of Labour (Conciliation) Nagercoil and the conciliation ended in failure. Thereafter the petitioner and the other workers filed claim petition before the Labour Court at Tirunelveli in I.D.Nos.154 to 165 of 2000, raising various contentions.

3. The third respondent was running 64 ration shops, fruit proceeding units, soap production units, IMFL shops, kerosine bunk etc. There are 17 vacant posts for salesmen and helpers in the respondent society in their different units. When IMFL shop was not functioning, all the employees working there were abruptly stopped without accommodating them in other services. The Labour Court gave a finding that the petitioners were entitled to the benefits under Section 25H of the Industrial Disputes Ac; and were entitled for re-employment without back wages subject to rule 64 of the Tamil Nadu Industrial Disputes Ruiles 1958 and accordingly passed an award on 24.04.2001. That award was not challenged.

4. Therefore, the petitioner filed W.P.No.19645 of 2000 for a direction to implement the award. This Court by an order dated 15.11.20 01 gave direction to the respondents to implement the Award dated 24.04.2001. On the date when the order was passed in the said writ petition, namely, 15.11.2001, the respondents passed an order advising the petitioner and other workers to withdraw the writ petition as the third respondent wanted to implement the award. That letter was received on 17.11.2001. Even thereafter the petitioners were not employed physically. In the meantime the petitioner received another letter dated 27.11.2001 terminating the services by enclosing a cheque for different amounts for the petitioner and the other workers. The said order was passed as an after thought, after this Court passed an order in W.P.No.19645 of 2001, with a mala fide intention. The said order dated 27.11.2001 is challenged in the present writ petition and the petitioner also prays for a Mandamus to reinstate him with back wages and continuity of service as per the Award dated 27.4.2001.

5. In the counter filed by the third respondent, it is stated that the petitioner was working as Helper in the IMFL shop; consequent to the order of the Government, banning the sale of liquor by Cooperative Societies, IMFL shop has to be closed in May, 1998 and the petitioner the other workmen working in the said shop were terminated and the termination was the subject matter of adjudication before the Labour Court, Tirunelveli and the Labour Court directed reinstatement without continuity of service and backwages. The petitioner and similarly placed persons filed W.P.No.19645 of 2001 for a direction to implement the award. This respondent, in terms of the award of the Labour Court, re-employed the persons with effect from 27.05.2001. After the implementation of the award since there was no scope to employ the petitioner and some other workmen, on 27.11.2001, they were retrenched from service. The third respondent being a Co-operative Society is not amanable to writ jurisdiction, more over, the appointment of the petitioner was irregular. Being a workman, he can always raise an industrial dispute. When vacancies arise, the petitioner can claim reemployment as per Section 25H of the Industrial Disputes Act. Further it is stated in the counter that the counsel

for the third respondent admitted before the Labour Court Tirunelveli that he was prepared to deploy the petitioner on the instructions of the then President of the third respondent society. Such instruction by the then President was without any justifiable reasons and it is not binding on the third respondent. Further it is stated that the third respondent sent letters to all the workmen on 15.11.2001, informing about the reemployment with effect from 27.05.2001. But none of them reported themselves to duty. In the circumstances, by an order dated 27.11.2001, the services of the petitioner and the other workmen were terminated and the wages payable for them for the period 27.05.2001 to 27.11.2001 were also paid by way of cheques. The termination of the petitioner was done in the larger interest and economic viability of the third respondent society. The writ petition is not maintainable and hence, liable to be dismissed.

6. Mr.Chandru, learned Senior Counsel appearing for the petitioner submitted that the award of the Labour Court was not implemented by the respondents and, therefore, the writ petition in W.P.No.19645 of 2001 was filed and this Court passed an order on 15.11.2001, directing them to implement the award. On the very same day, the third respondent issued an order offering re-employment. On the date when the certified copies were received by the petitioner and the respondents, namely, on 27.11.2001, the order of termination by way of retrenchement was passed. Therefore, this order is not a valid order and it suffers from mala fides. Further under Section 2(r)(a) read with Chapter 5C/25(c), 25V of the Act, it is unfair labour practice.

7. In support of this argument, learned counsel appearing for the petitioner relied upon the judgment of this Court in Cheran Transport Corporation Ltd. v. Presiding Officer, Labour Court, Coimbatore and another (1998 I LLJ, 511) wherein similar matter was considered and the learned counsel appearing for the employer had conceded certain things but later on it was refuted. U nder those circumstances the Division Bench of this Court has held that when such contention is raised by the management, the remedy of the employer is to approach the Labour Court for deletion of the concession said to have been made by the management or to ask for amendment of the award. The learned counsel submitted that in this case the counsel had not conceded any thing but it is the President of the third respondent Society who had actually conceded. Therefore, the award passed is binding on the respondent and the respondents shall implement the award. But under the guise of implementation of the award, the respondents have terminated the service of the petitioner without actually re-employing him but only by an order of reemployment in paper. Therefore, it is nothing but unfair labour practice and hence, the award cannot be said to have been implemented and hence, the writ petition is liable to be allowed directing the third respondent to implement the award.

8. Mr.T.Ravindran, learned Counsel appearing for the third respondent submitted that the order dated 15.11.2001 by this Court has been complied with. The petitioner and other workmen were re-employed and subsequently they were retrenched, exercising their power under Section 25F of the Act. The salary for the period in which they were re-employed has been paid by way of cheque. Thus the Labour Court's award has been fully implemented. When the subsequent order of termination was passed at the most it may furnish a different cause of action and that order of retrenchment can

be challenged before the Labour Court by raising industrial dispute. The same cannot be challenged before this Court by way of writ petition.

9. The learned counsel appearing for the respondent further contended that the impugned order was not passed with mala fides nor there is any legal malice in passing that order. The learned counsel referred to the judgment of the Supreme Court in State of Andhra Pradesh and others v. Goverdhanlal Pitti ((2003) 4 SCC, 739) where the Supreme Court has defined the "legal malice" as follows:

"The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the righs of others".

10. The learned counsel further argued that a writ petition does not lie except when the order was mala fide or when the order was passed without jurisdiction or when there is a violation of principles of natural justice. But the impugned order does not fall under any of these categories and hence the writ petition is liable to be dismissed.

11. Further, he also referred to Rule 63 of the Tamil Nadu Industrial Disputes Rules, 1959 which reads as follows:

"63. Re-employment of retrenched workmen.

(1) On the occurrence of vacancies after retrenchment, when an employer proposes to take into his employ any person, he shall---

i) arrange for the display on the notice board in the premises of the industrial establishment of the details of the vacancies to be filled;

ii) give notice of the vacancies in writing to every individual retrenched workman eligible to be considered for the vacancies, such notice being despatched by registered post to the address given by the workman at the time of retrenchment or any time thereafter;

iii) at the same time send a notice to the registered trade union or unions of workmen connected with the industrial establishment giving the number of vacancies and the names of the retrenched persons addressed; and

iv) if the employer seeks the assistance of the Employment Exchange in the area in filling the vacancies, inform the Exchange that the names of such of his retrenched employees as may have been registered with the Exchange may be submitted to him along with the of other suitable candidates;

Provided that clause (ii) shall not apply to vacancies which are temporary or casual and of less than a month's duration or which arise after the expiry of a period of two years from the date of retrenchment."

12. Referring to the above rule the learned counsel argued that the procedure laid down under Rule 63 of the Rules have been complied with. The petitioner and the other workmen were informed as per Rule 63 of the Rules by registered post about the existence of the vacancy and wanted them to join . But they did not join duty and, therefore, there is no question of violation of any of the provisions or rules. This argument is not acceptable. The intimation reads as follows:

"By the award of the Labour Court, Tirunelveli dated 27.04.2001 we were

directed to re-employ you without continuity of service, back wages and other benefits. Accordingly you are hereby re-employed with effect from 27.05.2001 i.e. the date when the award would have normally become enforceable. You will be paid wages for the period from 27.05.2001. As we are implementing the award you are advised to withdraw W.P.No.19645 of 2001."
This does not conform to R.63. This is not a mere intimation of vacancy but an advice to withdraw the writ petition. Therefore, this cannot be said to be an offer under Rule 63.
13. The case of the third respondent is that the petitioner and the other workmen were given re-employment and thereby the award of the Labour Court was implemented. To substantiate this contention, the only material placed before this Court is the letter dated 27.04.2001 . Except this letter, there is no other document to show that the petitioner and the other workmen were employed and they were drawing salary. But along with the letter dated 27.11.2002, the order of retrenchment along with a cheque for the salary for the period from 27.05 .2001 to 27.11.2001 were sent by the respondent . Therefore, from this it is proved beyond doubt that the respondent did not actually reemploy the petitioner and the other workmen. It is only found in paper that the re-employment order was issued.
14. If really the petitioners were re-employed, the attendance register and payment of wages account etc. should have been produced before this Court to prove the said fact. But no such records were produced. Therefore, the contention of the respondent that the petitioner and the other workmen were re-employed and the award of the Labour Court was implemented, is not acceptable.
15. The impugned order, admittedly, was passed on 27.11.2001 and along with that only a cheque towards the salary for the period from 27.05.2001 to 27.11.2001 was sent. Therefore, it proves that no other salary was paid earlier. If really the petitioner was re-employed he would have been paid salary every month. The contention of the learned counsel for the respondents that the petitioner and the other workmen were re-employed is not real. Only in order to circumvent the order of this Court passed in W.P.No.19645 of 2000 as well as the award of the Labour Court, the impugned order has been passed as if they are re-employed and subsequently, they were retrenched. Therefore, the impugned order though does not suffer from mala fides, yet there is a legal malice. In the decision referred to by learned counsel for the respondent cited supra squarely apply to the facts of the present case. It is a deliberate act done wrongfully and without lawful excuse. It is an attempt to show as if the order of this Court is complied with but in effect to float or disobey the order of this Court. Therefore, the impugned order suffers from legal malice though not mala fide and, therefore, the writ petition is maintainable. Therefore, the contention of the learned counsel for the respondents that the retrenchment order give rise to different cause of action and therefore, the only remedy is to approach the Labour Court by raising industrial dispute and the same cannot be challenged before this Court by way of writ, is not acceptable. For the foregoing reasons, the impugned order is set aside and the writ petition is allowed as prayed for. No costs.

Index : Yes
Internet : Yes

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